Supreme Court, U.S.
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No. 96 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDWARD DONALD MOODY,
Petitioner,

v.

DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; DR. WAYNE TEAGUE, in his official capacity as State Superintendent of Education; THE PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; and DR. HALYCON V. BALLARD, in her official capacity as Director of State Personnel,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether changing an employment promotional policy to emphasize subjective criteria rather than specific professional experience, inevitably resulting in a marked disadvantage to older employees, is violative of the Age Discrimination Employment Act?
2. Whether the established pattern and practice of routinely promoting the youngest person available is relevant to the trial court's determination of the existence of age based discrimination?
3. Whether an arbitrary quasi-legislative state administrative policy-making decision is violative of principles of substantive due process?
4. Whether age related classifications which arbitrarily and adversely impact older persons are violative of the Equal Protection Clause?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents to this Honorable Court that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on January 29, 1996 (App. 1a) and the order denying rehearing and rehearing en banc was entered on April 17, 1996 (App. 22a). The unpublished decision of the United States Dis-

trict Court for the M.D. of Alabama was entered on March 13, 1995 (App. 6a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated January 29, 1996 and rehearing en banc on April 17, 1996.

The statutory provision conferring jurisdiction upon this court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The Plaintiff, Edward Donald Moody, filed his initial complaint in this case on April 23, 1993, alleging that he was 60 years of age and had been discriminated against in his employment because of his age. (R1-1). The complaint was filed against his employer, the Department of Education of the State of Alabama, and it sought relief based upon the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. The complaint was subsequently amended to add as a Defendant Dr. Wayne Teague, in his official capacity as State Superintendent of Education, (R1-25),

and was again amended to add the Personnel Department of the State of Alabama and also Dr. Halycon V. Ballard, as Director, State Personnel, as Defendants. (R2-36).

The Defendants all filed Answers to the Complaint. (R1-4; R1-31; R2-40; R2-41). Additionally, all Defendants submitted motions for summary judgment (R1-9; R2-48) and briefs and materials in support thereof. (R1-10; R1-28; R1-32; R2-49; R2-56). The Plaintiff filed his responsive material under Rule 56, Fed. R. Civ. P. (R1-13; R1-14; R1-34; R2-58; R3-59; R3-60; R3-61; R3-62; R3-67).

The trial court granted summary judgment in favor of all Defendants on March 13, 1995 (R3-69), which judgment was supported by a contemporaneous memorandum opinion. (R3-68). The Plaintiff filed a timely motion to alter or amend the judgment (R3-70), which was denied by the trial court on April 19, 1995. (R3-70).

Moody perfected an appeal to the Eleventh Circuit Court of Appeals. Following briefing of the issues, the court entered a per curiam opinion on January 29, 1996 affirming the trial court. Subsequently, on April 17, 1996, the Eleventh Circuit denied Moody's Petition for Rehearing/Suggestion on Hearing En Banc.

B. Statement of the Facts.[1]

The Plaintiff, Edward Donald Moody, is presently 63 years of age. He was hired by the Alabama Department of Education on January 10, 1996. At that time, Moody held the position of Rehabilitation Counselor II. Moody

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[1] This statement of the facts will constitute a virtual verbatim repetition of the trial court's recitation of them in its memorandum opinion at Volume 3, document 68, pages 2 to 7, with the trial court's footnotes merged into the body of the statement. Where there is a diversion from the trial court's recitation, the proper references will be made to the record or to other authority where the material referred to may be found).

remained in that position until he resigned from the Department of Education on November 13, 1967.

On November 11, 1971, Moody returned to the Department and resumed his former duties as a Rehabilitation Counselor II. Moody was promoted to the position of Rehabilitation Counselor III on October 11, 1972, and to the position of Rehabilitation Supervisor I on May 7, 1975. The title of this position was subsequently changed to Disability Determination Supervisor I. On December 27, 1978, Moody was promoted to his present position as a Disability Determination Supervisor II. Despite having submitted several applications since that time for the position of Disability Determination Supervisor III, Moody has not been promoted to a higher supervisory level. Moody's most recent application, which he submitted in response to an August 19, 1992 job announcement, is the main focus of this lawsuit. Moody contends that this application was rejected because the defendants were biased against older employees. Moreover he argues that the defendants' biases permeated the procedures established for hiring and promoting employees.

Traditionally, when a state agency wishes to hire or promote persons for a particular job classification, the agency will notify the State Personnel Department, which in turn will publish a promotional examination announcement. Persons responding to a particular announcement are required to submit their applications directly to the Personnel Department. All of the applications are then set aside for grading. Based on these grades, the Personnel Department will select a certain number of applicants for a "register of eligible." The register is a list of those persons who are deemed certified as eligible for promotion or hiring. Under state law, any person appearing on the list may be hired or promoted by the state agency's hiring authority. Section 36-26-17, Code of Alabama, (1975). While the trial court observed, at R3-68-3, "[t]here is no requirement that the person selected have

the highest grade ranking on the register" and that "[a]ll persons who are certified are deemed equally qualified," it is submitted that such statements are misleading. Persons on the "register of eligible" are in fact rated in the order of their qualifications. This ranking is of significant importance in this case. See *U.S. v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

As the foregoing suggests, the grade assigned to an applicant determines his or her ranking and whether he or she will appear on the register. An assigned grade is generally based on two criteria; an applicant's training and experience, and his or her service ratings over the preceding three years.

The training and experience component measures an applicant's time on the job and "relevant" work experience. The inquiry into the applicant's relevant experience keeps this portion of the grading from being a simple question of seniority. Job experience is relevant only up to a point, after which an applicant is considered to have "topped out." Thus, with many state job classifications it is possible for an applicant to have the same training and experience score as someone who is many years his senior. Prior to the Disability Determination Division's 1992 job announcement, the training and experience component accounted for 80% of the total grade while the three year service rating component accounted for 20% of the grade. Those percentages were changed in 1992 at the suggestion of an independent management review team commissioned by the Division to study its promotion policies. Thereafter, the Division requested that the applicants' training and experience scores constiture 60% of their total grade, and that their three year service rating score constitute 40% of their grade. The Personnel Department agreed to the change with the understanding that the new percentages would apply to all of the job classifications within the Division. The

new percentages were in effect during the 1992 Supervisor III promotions.

The service rating component is based on an average of the applicant's performance evaluations over a three year period. Evaluations are routinely made for all state employees. The evaluations are designed to quantify an employee's performance and ability in several different job-related areas. In 1990, the State Personnel Department made several changes to the Performance Evaluation System, which included changes in the Performance Appraisal forms used by employee supervisors. The Personnel Department required all supervisors, including Moody, to receive extensive training regarding the system. The new system was in place during part of the three year period leading up to the 1992 Supervisor III job opening.

Prior to his 1992 application for the position of Disability Determination Supervisor III, Moody submitted applications for the same position on three different occasions. In each instance, Moody was among the number of applicants who were certified as eligible for promotion.

In 1984, Moody submitted an application for the position of Disability Determination Supervisor III to the State Personnel Certificate of Eligible. Moody was ranked number three out of four based on the grade assigned to him. The persons ranked number two (Ann Anderson) and four (William Smith) were selected by the Department of Education's Disability Determination Division.

In 1986, Moody submitted an application for the same position to the Personnel Department and again he was included on the Certificate of Eligible. In this instance, Moody was ranked number two out of four persons listed on the Certificate of Eligible. The person ranged number four (Jack Miller) was selected for the position by the Department of Education's Disability Determination Division.

In 1989, Moody submitted another application to the Personnel Department and again his name was among those included on the Certificate of Eligible. Moody was ranked number one out of five. The persons ranked number four (Wanda Thomas) and five (Stephen Scruggs) were promoted to the position of Disability Determination Supervisor III.

In response to an August 19, 1992 promotion announcement, Moody submitted the application referred to in his complaint. On November 3, 1992, the State Personnel Department certified a list of eight persons eligible for promotion to the two positions. Moody was included in that list and was ranked seventh out of eight persons. Again, the Division did not select him for either of the positions. The persons selected were James Methvin, who was ranked number one, and Steven Stewart, who was ranked number four. Methvin was 41 years old at the time of his promotion and had been employed with the Department since 1974. Stewart was 43 years old at the time of his promotion and had been employed with the Department since 1973.

At the time of the promotion of Methvin and Stewart over Moody, all three were serving as Supervisors II. Moody had 17 years of supervisory experience, 13½ years of which were as a Supervisor II. Methvin had only 6 years of total supervisory experience, with only 3 of those years as a Supervisor II, and Stewart had a total of 9 years of supervisory experience, with only 2 of those years being served as a Supervisor II. (R1-13-3; R1-14 A5 [in separate binder]). Since no experience beyond the "top out" period of two years was considered, each of those three candidates received the same score for "training and experience". (R1-13-5).

Moody alleges that he was denied a promotion to the position of Disability Determination Supervisor III because the promotion system developed by the Personnel

Department and implemented by his own Division of the Education Department discriminated against applicants based on their age. Specifically, Moody argues that the following factors created this allegedly biased system:

1. That the new performance evaluation system put in place by the State Personnel Department in 1990 was less objective than the previous system, and that this lack of objectivity caused him to receive lower evaluation scores in some instances.

2. That the Disability Determination Division decided pursuant to an independent management review team recommendation to change the weight of an applicant's experience and training score from 80% of his or her overall grade to 60%.

3. That an applicant's experience and training score can "top out" after a certain number of years in the same position.

Moody asserts that the defendants' failure to promote him violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Age Discrimination in Employment Act of 1967. The Defendants have responded to these charges by stating that Moody cannot make out a prima facie case of age discrimination under any legal theory. Furthermore, the defendants assert that even if Moody has made out a prima facie case, he has failed to put forth any evidence proving that the defendants' proffered reasons for the employment actions are pretextural.

As will hereinafter be explained in the argument, the net results of events since 1984 has been that younger persons have consistently and without exception been promoted instead of older applicants.

REASONS FOR GRANTING THE PETITION

I. THE 1992 COMPETITION.

The district court's memorandum opinion at R3-68-8 through 14, assesses the Plaintiff's case under the disparate treatment tests laid down in *McDonald Douglas Corp. v. Green*, 411 U.S. 992 (1973). It concluded that Moody had met the *prima facie* standards of *McDonald Douglas* by proving that he was a member of a protected group, that he had been subjected to adverse employment treatment, that substantially younger applicants were promoted in his stead, and that he was qualified for the promotion.

The trial court noted, however, that since the Personnel Department and its Director did not participate in the actual selection of candidates, that it had not subjected Moody to adverse treatment, and that Moody had therefore not established a *prima facie* case against those Defendants. That decision totally overlooks the fact that the Personnel Department Defendants set the mechanism in motion by establishing standards that permitted Moody's younger competitors to outscore him on the qualifying material.

The trial court also ignored the principle, argued by the Plaintiff at R1-13-9, that the de-emphasis upon experience and the "topping out" of credit therefore constituted an adverse disparate impact upon older persons as a class. Disparate impact claims involve employment practices that are facially neutral but that subject the protected group to more stringent treatment that cannot be justified by business necessity. *Hazen Paper Company v. Biggins*, 507 U.S. ——, 123 L.Ed. 2d 338, 113 S.Ct. 1701 (1993). Proof of discriminatory motive is not required under a disparate impact theory. *Teamsters v. United States*, 431 U.S. 324 (1977). Even if the practice of de-emphasizing could be shown to serve a legitimate business purpose, Moody should still prevail if an alternative practice exists without producing an adverse impact on

the protected group. See *MacPherson v. University of Montevallo,* 922 F.2d 766, 771 (11th Cir. 1991).

The trial court clearly erred when it held that a *prima facie* case against the Personnel Department Defendants had not been established, and further erred when it failed to examine the facts in this case in the light of the disparate impact theory.

In its memorandum opinion, at R3-68-13, 14, the trial court reviewed the Defendants' purported legitimate non-discriminatory reasons for their non-promotion of Moody. As to the change in performance evaluations to a more subjective system, the Defendants' assert that all of that responsibility lies with the Personnel Department officials, and that Moody's lesser scores were caused by his own lack of performance. However, two of Moody's rating supervisors could not identify any reason for the drop in Moody's performance evaluations except for the change in the rating procedure. (R1-14-E12, 13; R1-14-F24 through 27). Another anomaly that existed was that Moody's ratings were reduced only for the years used to evaluate the 1992 applicants for the position of Disability Determination Supervisor III, and reverted back up to a higher level the following year. (R1-14-A5, 6).

The trial court also observed that the Defendants attempted to explain the de-emphasis upon the experience factor by pointing out that a system rewarding experience would stifle the advancement of otherwise "qualified minority applicants." (R3-68-14). The court also noted the Defendants claim that the de-emphasis did not harm Moody, because he received the same experience score as all of the other applicants since all scores were "topped out" at a certain level. "Topping out" was deemed appropriate because "every additional year in the same position does not produce an equivalent increase in productivity." (R3-68-14). These responses, when applied to Moody, are arbitrarily circuitous. He was the candidate

with the most experience, but he is told that he should not complain because he gets the same score as younger, less experienced workers. He is then also told that experience does not count after an arbitrary time limit is placed upon it as a factor. Those reasons themselves demonstrate that they are posited upon a pretext. At the very least, the evidence is due to be submitted to the trier of facts, because the proffered "legitimate, nondiscriminatory" reasons are all aimed at removing the older and more experienced supervisory employee's competitive edge over younger applicants.

II. THE PATTERN OF DISCRIMINATION.

The trial court's memorandum opinion recites that a *prima facie* case of age discrimination may be established "by statistical proof of a pattern of discrimination." (R3-68-9 [quoting from *Verbraceken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989]).

It has been pointed out in this case that, for the ten year period covering 1985 to 1994, no one over the age of 50 within the supervisory ranks of the Disability Determinations Division of the [Education] Department ("DDD") was promoted to a higher position. (R1-14-A2).

In 1984, there were four persons on the register for promotion to DDD Supervisor III, and Moody was ranked number three. The person ranked number two (Ann Anderson) and four (William Smith) were selected (R3-68-6). Ms. Anderson, age 65, and Mr. Smith, age 54, were the oldest persons on that register. (R3-61-4). From that point forward, all persons promoted to DDD Supervisor III have been the youngest reachable candidates. In 1986 and 1989, the appointing authorities found it necessary to pass over all persons on the list who were older in order to reach the youngest candidate. In 1986, when Jack Miller was promoted, he was 36 years of age

and was ranked number 4 (R3-68-5). In order to appoint him, it was necessary to pass over number one-ranked William R. Myers, who was 54 years of age, number two-ranked Moody, who was 53 years of age and number three ranked Evelyn C. Woolsey, who was 62 years of age. (R3-61-4).

In 1989, Wanda E. Thomas was ranked number 4 and was 48 years of age, and number five ranked Steven S. Scruggs was 40 years of age. They were both promoted over Moody, who was ranked number 1 and was 56 years years of age, and Olin K. Anthony, who was ranked third and who was 57 years of age. (R3-68-5; R3-61-4).[2]

After the de-emphasis on experience occurred, the 1992 register reflected that the youngest applicant on the register, James R. Melthvin, placed number one. He was 41 years of age at the time. The other person promoted, Steven R. Stewart, was 43 years of age and was the second youngest person on the list. (R3-61-4). The older persons on the list were ranked as number five, seven, and eight.

The available statistics clearly reveal that all promotions to DDD Supervisor III since 1984 have gone to the youngest possible candidates. With the previous system of giving full credit for experience, it was necessary to pass over more qualified older people to get to the younger applicants. The obvious conclusion reached was that such a practice would be challenged as unlawful if it continued, and that some alternate system would be required to improve the standing of the younger applicants. That result was accomplished by the de-emphasis

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[2] The U.S. Supreme Court has recently held that an individual in the protected class of those over 40 years of age may be discriminated against where the favorable treatment goes to a younger individual despite said younger individual's age also being in excess of 40. *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. —— (1996), 134 L.Ed.2d 433.

upon experience and the insertion of more subjective criteria which could be tailored to provide the desired result without the blatant violation of statutory and constitutional provisions.

III. SUBSTANTIVE DUE PROCESS.

At R3-68-15 and 16, the trial court relied upon the case of *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), to hold that there can be no substantive due process violation in the employment context. The trial court also noted that the Due Process Clause did not apply because Moody had claimed no property right in his desire to be promoted. (R3-68-16).

The Plaintiff contends that he does have a property right to protect in this case. That property right involves the right to compete for a high numerical position on the list of eligible; the best qualified person has a right to the number one ranking position on the list of eligible. The United States Supreme Court held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) that "[a] claimant has more than an abstract desire or interest in redressing his grievance; his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of evidence." *Logan* set a precedent for protecting the property rights of intangible property, such as the right to certain basic minimum procedural requirements. *Id.*

The Plaintiff contends that his right to seek a high ranking on the register and the corresponding right to equal access to that place (equal to the other competitors) has been violated by the Personnel and Education Defendants. Both the Personnel and Education Defendants have determined that only a certain number of years' supervisory experience is "relevant experience." The action of capping those years and refusing to consider the

totality of a candidate's years of experience is one violation of which the Plaintiff complains. Further, the Defendants have diminished the overall importance of experience in the promotion process by reducing the percentage weight for expereince from 80% to 60% while increasing the percentage weight assigned to the far more subjective factor of performance ratings by one's supervisor's. The Plaintiff loses the benefit of a wealth of valuable experience, which is indubitably one of the primary and essential assets which any candidate for any hiring or promotion (except this particular promotion) fundamentally needs to secure that promotion. Typically, employers acknowledge the desirability of obtaining experienced employees; the more experienced the worker, the more valuable. It is the Defendants' legislative act in discounting years of experience that violates the Plaintiff's due process rights, by capping total years experience off after an *arbitrarily designated* point and by decreasing the overall value assigned to that attribute. The Plaintiff asserts that the right to placement on the register and, more precisely, to be placed at his rightfully earned numerical rank, is the entitlement which has been wrongly blocked by the Defendants' actions. The well recognized case of *U.S. v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), fully supports the premise that the appropriate register ranking is protected by the Fourteenth Amendment's Due Process Clause.

In *McKinney*, the Eleventh Circuit makes two critical distinctions. The first is between substantive and procedural due process. The Plaintiff has made no procedural due process claims in this case, so that portion of *McKinney* dealing with procedural due process need not be discussed. The substantive component of the due process clause bars certain arbitrary and wrongful government actions "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Plaintiff's due process

claims are substantive in nature. Whether *McKinney* applies to substantive due process depends upon whether the violation alleged by a plaintiff was the result of a legislative act or an executive act. The Eleventh Circuit in that case cautions that "we hold that, *in non-legislative cases,* only procedural due process claims are available to pretextually terminated employees." 20 F.3d at 1560 (emphasis added). The Plaintiff submits that the due process violations he alleged in this case are the result of legislative acts, and therefore, the decision in *McKinney* is inapplicable to his case.

The Defendants below attempted to limit non-legislative acts to the executive branch of government and legislative acts to "legislative bodies using legislative procedures." (R1-32-2). Although such characterizations may be the general rule, they are not exclusive. As the Eleventh Circuit states in *McKinney*: "Executive acts *characteristically* apply to a limited number of persons (and often to only one person); executive acts *typically* arise from the ministerial or administrative activities of members of the executive branch." *Id.* at 1557 n.9 (emphasis added). The most common example of an executive act case is an employment termination. See *Board of Regents v. Roth,* 408 U.S. 564 (1972) distinguishing legislative acts, the Court then stated: "Legislative acts, on the other hand, *generally* apply to a larger segment of—if not all of—society; laws and broad-ranging *executive regulations* are the most common examples." 20 F.3d at 1557 n.9 (emphasis added). The Court discussed *Harrah Ind. School Dist. v. Martin,* 440 U.S. 194 (1979), in which the school board instituted a new, prospective rule under which the renewal of the contract of any teacher who refused to take continuing education courses was precluded. Ms. Martin refused to take the courses, the school board refused to renew her contract, and Mr. Martin sued on the basis of a substantive due process violation. *McKinney* explained that "[e]ven though the School Board had

applied its rule only to Martin, the Supreme Court examined the case as one involving a legislative act; hence, the Court analyzed the rule itself, not the School Board's application of the rule to Martin." 20 F.3d at 1557 n.9.

It is clear, then, that the promulgation of executive regulations and rules are indeed considered legislative in nature, even though they were not the acts of a traditional legislative body. It is also clear that the application of those rules and regulations to even a single person can be challenged on the basis of substantive due process because the challenge is to the rule or regulation itself, not its application to the person.

The issue of a substantive due process right within an employment context, as addressed in *McKinney,* is of such importance as to invite a visit to this issue, by the Court.

It is respectfully submitted that the *McKinney* holding constitutes no barrier to Moody's due process claim in this case.

IV. EQUAL PROTECTION OF THE LAW.

The trial court has held that no equal protection claim can survive in this case. In so doing, however, the trial court seems to concede that an age-based classification can be made the basis of an equal protection claim, citing *Vance v. Bradley,* 440 U.S. 93, 97 (1979). If, indeed, these Defendants set out to deliberately deprive older persons of established rights by depriving them of the fruits of their lengthy experience, that effort would not only be irrational, but could also qualify as being callous.

CONCLUSION

For all of the foregoing reasons, the Appellant Moody respectfully requests that this Honorable Court grant a petition for a Writ of Ceriorari to the Eleventh Circuit Court of Appeals, reverse the decision of the trial court, and remand this cause to that court for the trial of the issues.

Respectfully submitted,

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